IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 428

PENNSYLVANIA WATER & POWER COMPANY AND SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, *Petitioners*,

VS.

FEDERAL POWER COMMISSION, AND CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, INTERVENORS, *Respondents*.

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION *Petitioner*,

VS.

FEDERAL POWER COMMISSION, AND CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, INTERVENORS, *Respondents*.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF INTERVENOR-RESPONDENT PUBLIC SERVICE COMMISSION OF MARYLAND IN OPPOSITION TO GRANTING OF CERTIORARI

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The Daily Record Co., Baltimore 3, Md.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported. It will be found in Vol. XVIII of the Record, pp. 46-72.

The Opinions and Orders of the Federal Power Commission affirmed by the Court of Appeals have not yet been published. They appear in the Record as follows: (1) Opinion No. 173 and Order of January 5, 1949 — Record, Volume XVI, pp. 39-191; (2) Opinion No. 173A and Order of February 28, 1949, denying Petition for Rehearing on Opinion No. 173 and Order of January 5, 1949 — Record, Volume XVI, pp. 372-388; (3) Order of March 17, 1949, denying Petition for Rehearing on Opinion No. 173A and Order of February 28, 1949, — Record Volume XVI, p. 414; (4) Order of October 27, 1949, prescribing rate schedules — Record, Volume XVII, pp. 46-71; and (5) Order of December 15, 1949, denying application for rehearing on Order of October 27, 1949 — Record, Volume XVII, pp. 94-99.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under U. S. C. Title 28, Section 1254(1) and under U. S. C., Title 16, Section 825 l.

COUNTER STATEMENT OF THE CASE

Respondent-intervenor, Public Service Commission of Maryland (hereinafter referred to as "Maryland Commission") does not accept the Statement of the Case by Pennsylvania Water and Power Company (hereinafter referred to as "Penn Water") or that of the Pennsylvania Public Utility Commission (hereinafter referred to as "Pennsylvania Commission") because those petitioners, in a patent effort to divert the attention of this Court from the fundamental administrative-procedure determination of the Opinion below, misstate the only issue of substance which their petitions raise.

The Opinion of the Court of Appeals for the District of Columbia Circuit, and the judgment based thereon, affirm in normal manner rate orders of the Federal Power Commission which were based upon and fully supported by an extended record of hearings held during a long period of time. Certiorari should not issue from this Court unless there is serious question as to whether the Court of Appeals made a reversible error of law in its construction of the Federal Power Act, and the Federal Power Commission's authority under the Constitution and laws of the United States. No possibility of such error appears, in any manner, in either petition for certiorari.

The proceedings below were statutory appeals from final orders of the Federal Power Commission in an extensive rate investigation of Penn Water's wholesale charges, for hydroelectric power and energy sold by it to Consolidated Gas Electric Light and Power Company of Baltimore (hereinafter referred to as "Consolidated"). These orders hold, in effect, that Consolidated is entitled on a 1946 basis to an annual rate reduction of approximately $1,700,000 on its power bill from Penn Water. The total annual rate reduction ordered by the Commission in Penn Water's rates, on a 1946 basis, amounts to approximately $2,000,000 (FPC Opinion No. 173 and Order of January 5, 1949, Opinion No. 173A and Order of February 28, 1949, and Order of March 17, 1949, Volume XVI pp. 39, 372, and 414, respectively), the remaining $300,000 of the rate reduction being allocated to Penn Water's Pennsylvania customers. This reduction was ordered to be carried out by rate schedules specified for Penn Water by the Federal Power Commission in its Order of October 27, 1949, a petition for rehearing being denied by the Commission's Order of December 15, 1949 (Record Volume XVII pp. 46 and 94, respectively).

The rate case before the Federal Power Commission was begun by order issued September 1, 1944, and a supplemental order issued October 3, 1944, which instituted an investigation of the services, contracts, rates, and charges of Penn Water for any transmission or sale of electric energy subject to the Commission's jurisdiction under the Federal Power Act. A companion order issued on the same date (September 1, 1944) began a similar investigation of the rates and charges of Safe Harbor Water Power Corporation (hereinafter referred to as "Safe Harbor"). Both orders were issued in response to the request of the Maryland Commission* (Petition of August 31, 1944 — Record Volume XVI p. 41), which had pending before it a general investigation of the rates and charges of Consolidated to its Maryland consumers. The Maryland Commission found it necessary to have a prior determination by the Federal Power Commission of the *wholesale* rates paid by Consolidated for hydroelectric power and energy obtained from Penn Water and Safe Harbor, before passing upon the reasonableness of Consolidated's *retail* rates to its Maryland consumers.

The generating facilities of Penn Water, Safe Harbor, and Consolidated are coordinately operated as an integrated and interconnected electric system, the interconnection being provided primarily by an extensive network of transmission lines owned by Penn Water and its wholly owned subsidiary, Susquehanna Transmission Company of Maryland. These integrated operations, as currently performed, were begun under two long-term contracts executed in 1931, to continue until 1980. These contracts were filed with the

* Additional requests for investigation were filed by the governmental authorities of Baltimore City, Baltimore County, and other intervenors in the rate case before the Maryland Commission (Record Vol. XVI, p. 41).

Federal Power Commission in 1936 in compliance with the provisions of the Federal Power Act (Sec. 205 (c); 16 U. S. C. 824d (c)) and thus became the service and rate tariffs of the three companies, passing out of the realm of contract and into that of duty established by law.

Under one agreement (the "Safe Harbor contract") entered into on June 1, 1931, and supplemented by amendments dated August 1, 1932, and November 22, 1939, Consolidated purchased two-thirds and Penn Water purchased one-third of the entire Safe Harbor hydro output, produced at Safe Harbor, Pennsylvania, until 1980. In return, Consolidated and Penn Water assured Safe Harbor of a combined annual payment (divided two-thirds and one-third between the two companies) sufficient to yield a specified annual return above operating expenses. Under the other agreement (the "Penn Water contract"), entered into between Consolidated and Penn Water on the same date, June 1, 1931, Consolidated purchased all the power and energy available to Penn Water from its hydroelectric and steam generating plants at Holtwood, Pennsylvania, and also Penn Water's one-third of Safe Harbor's power and energy not otherwise disposed of in performance of Penn Water's obligations to its other customers. Consolidated pays Penn Water annually a lump sum sufficient to cover all operating expenses and taxes (including Penn Water's payment to Safe Harbor) plus a specified return.* These

* A survey of the Opinions of the Fourth Circuit in the Penn Water and Safe Harbor Contract cases will show that no criticism is made of the economical, coordinated, and integrated operations of the system which result from the above-described provisions, or even of any of the provisions themselves. The Opinions in the Penn Water contract case (184 F. 2d 552, and 186 F. 2d 934) clearly condemn as illegal per se only Articles IV and V of the Penn Water contract, which gave Consolidated control over Penn Water's contracts with others and over installation or disposition of generating facilities. This distinction was carefully observed by

contracts constitute part of the record before the Federal Power Commission as Items E, F, G, H, and I, and appear in the Record pp. 4554-4621. The form of service and payment therefor as thus described has been prescribed by the Commission's Orders.

The vast triangular power pool resulting from this coordinated arrangement for the interchange of energy and services has provided the Maryland consuming public with an economical, reliable, and necessary supply of hydro power since 1931. The overall plan has been consistently praised by all parties (see footnotes, pp. 8 and 9), until just before the Federal Power Commission ordered Penn Water to reduce its rates. Then, and only then, did Penn Water allege that the 1931 contracts were invalid. By strong inference, the plan has also been praised even by the two Fourth Circuit Opinions which held parts of the two 1931 contracts (not the operations) to be illegal per se.

The Safe Harbor rate case was tried first by the Federal Power Commission. It resulted in that Commission's Opinion No. 143 and Order of November 4, 1946 (5 FPC Rep. 221), in which the Commission reduced the rates of Safe Harbor to Penn Water and Consolidated by approximately $600,000 annually on a 1943 basis, saying in part:

> "The inter-connected system is so operated as to obtain the lowest cost for system power and energy requirements. The output of each generating facility flows into the system at such times and in such amounts as will produce economy of operation and reliability of service. * * *
>
> "Under a 1927 contract which, as amended (Basis Agreement), continues in effect until 1980, the Mary-

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the Opinion below. It is also confirmed by the Fourth Circuit's Opinion in the recently decided Safe Harbor contract case, *Consolidated Gas Electric Light and Power Company of Baltimore et al. v. Pennsylvania Water and Power Company et al.*, decided January 3, 1952.

land company is entitled to all the electric capacity and energy not otherwise disposed of under existing contracts or by any obligation to serve imposed upon the Pennsylvania Company (Penn Water) by its charter or by law, which is available from the Pennsylvania Company's hydro and steam plants, as well as that available to the Pennsylvania Company from Safe Harbor. The Pennsylvania Company may require the Maryland Company (Consolidated) to supply it with steam generated energy (backfeed) in excess of the Maryland Company's own requirements, up to the available capacity of the Maryland Company's generating stations then being operated. The Maryland Company agrees to reimburse the Pennsylvania Company for all of its operating expenses, including taxes, depreciation, and the cost of power from Safe Harbor, as well as a certain return, less a credit for the revenues which the Pennsylvania Company receives for local sales in Pennsylvania."

The U. S. Court of Appeals for the Third Circuit upheld the Federal Power Commission's decision in every respect, noting that "Safe Harbor's output is delivered to an integrated interstate electric system * * *", and held that "Safe Harbor's contracts for power and its backing by the Pennsylvania and Maryland companies *are exemplary.*" (Emphasis supplied.) See *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. (2d) 179, cert. denied 339 U. S. 957 (1950).

In the Penn Water rate case (the present proceedings), hearings began on April 15, 1946, and concluded July 16, 1947, during which time over 26,000 pages of Record and hundreds of complicated exhibits were received. Following submission of voluminous briefs, the Federal Power Commission issued Opinion No. 173 and its Order of January 5, 1949 (Record Volume XVI pp. 39-191), ordering Penn Water to reduce its rates and charges, on a 1946 basis, in the total amount of approximately $2,000,000 annually.

During the entire period of the proceedings before the Commission, neither Penn Water nor the Pennsylvania Commission raised any question as to the validity of the long-term contracts under which the interconnected system had been established in 1931, and which as tariffs had been controlling the services of Penn Water and Safe Harbor since they were first filed in 1936 in response to the Order of the Federal Power Commission.

In its petition for rehearing filed with the Federal Power Commission on January 28, 1949, Penn Water asserted for the first time the fact that it considered its long-term power contracts to be null and void, and that it was making this assertion the basis of court proceedings recently instituted in the United States District Court for Maryland. Denying this petition, the Commission, in its Opinion 173A and Order of February 28, 1949 (Record Volume XVI pp. 372-382), informed Penn Water that its rate order rested upon *services as they had been rendered since 1931,* as testified to in the Record before the Commission, and as they must continue to be rendered until changed in the manner required by the Commission's rules issued under the provisions of the Federal Power Act. The Commission pointed out that illegality of particular provisions of the contracts could not affect the rates established by the Commission in relation to services actually rendered, and as they were continuing to be rendered (and have in fact continued to be rendered to the date of this Brief).*

* The Commission makes it quite clear, in its Opinion No. 173A, that it considered it improper to further delay rate reductions which were long overdue in relation to services which had been rendered in the same manner since 1931. The Commission emphasized the testimony of the officers of Penn Water that the integrated interconnected power system was "the outgrowth of twenty years of experience by the two companies in determining the best methods of promoting the coordination of the hydro and transmission facil-

Penn Water, although it continued its collateral attack on its long-term hydro contracts in the United States District Court for Maryland, did not choose to exercise its right to petition for changes of its tariffs as filed with the Federal Power Commission, or of its services as rendered thereunder. Instead, it elected to stand on the record before the Commission and to pursue its appeal from the Commission's orders to the U. S. Court of Appeals for the District of Columbia Circuit, filing a 238 page printed brief, supplemented by a 49 page brief filed by the Pennsylvania Commission. The Federal Power Commission replied with a printed brief of 178 pages, the Maryland Commission with 36 pages, and Consolidated with 50 pages. After these main briefs were filed, and the case ready to be set for argument on the merits, Penn Water and the Pennsylvania Commission filed motions to postpone the date of oral argument. Subsequently, they filed motions to annul or remand the orders of the Commission, asserting that they had been rendered void by the decision of the Fourth Circuit in the Penn Water contract case, *Pennsylvania Water and Power Company, et al. v. Consolidated Gas Electric Light and Power Company, et al.*, 184 F. 2d 552, 186 F. 2d 934, cert. den. 340 U. S. 906. The Court allowed time for extended briefing and argument of these motions, in assigning the case for three days of oral argument, divided between the motions and the appeal on the merits.

Having failed, after these extended briefs and argument below, to convince the Court of Appeals that there was any

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ities of Penn Water with the steam generating plants of Baltimore Company, to the end of maximum utilization of natural resources, minimumzation of investment and the utmost in service availability to the ultimate customers," and that this should not be changed except by the procedures provided by the Act. (Record Volume I p. 69. See also Record Volume I pp. 25-26 and Volume XVI pp. 374-383.)

error in that Record of over 26,000 pages* of proceedings as conducted from September 1, 1944, to July 16, 1947, and culminating in the Order of January 5, 1949, petitioners now seek to have the entire effect of those proceedings destroyed and the purposes of the Federal Power Act frustrated, by insisting that the Court below erred in refusing to annul or remand the Commission's orders because of a collateral determination subsequently obtained by Penn Water in the Fourth Circuit, in proceedings to which the Federal Power Commission was even not a party. Petitioners make this argument despite the fact that the Fourth Circuit stated in the Penn Water contract case that its action did not extend to the rates (and accordingly services) covered by the Commission's Orders (*Pennsylvania Water and Power Company, et al. v. Consolidated Gas Electric Light and Power Company of Baltimore, et al., supra*—see infra, Argument III.)

The Court below referred to and accepted such statement of the Fourth Circuit in good faith, and did not disagree therewith; rather, it treated that statement as consistent with the view expressed below — that what might be illegal as contract between the parties, as constituting a monopoly in violation of the Sherman Act, might nevertheless be valid as an approved tariff or ordered operation

* The printed record in the Court below consisted of 4805 pages, plus an additional 514 pages of Appendices to Penn Water's Briefs. As is indicated in the first footnote of page 2 of Penn Water's petition, it sought to restrict the Record here. If this had been accomplished, the Court would not have before it the real nature of the case and the Record which shows the ample and complete support for the Commission's Orders, including the evidence of Penn Water's officers (Record Vol. I pp. 20-28, 31-46, 69), showing their sworn support of the integrated interconnected power pool which the Commission's Orders maintain — quite contrary to their later collateral efforts to destroy the benefits of that pool, by attacking the contracts which put it in operation.

by the Federal Power Commission, acting in pursuance of the directive of Congress specified in the Federal Power Act (Record Volume XVIII pp. 49-54). The Court below, however, did not rest with this reconciliation of the Commission's orders with the Opinion of the Fourth Circuit in the Penn Water contract case. Regardless of such reconciliation, it based its decision squarely on its holding that if Penn Water had any right to change its services or rates as a result of having had its contracts declared illegal in violation of the Sherman Act, it should pursue its legal remedies under the Federal Power Act, as it had first been directed to do by the Commission when the petition for rehearing before that Commission was denied.

The ensuing restatement of questions presented, and argument with reference thereto, will show that Penn Water is in no manner aggrieved by such a decision, that there is no conflict of circuits with reference thereto, and that certiorari, as requested by petitioners, should be denied.

RESTATEMENT OF QUESTIONS

The petitioners, Penn Water (its petition, p. 17) and Pennsylvania Commission (its petition, p. 19) each state three questions which they seek to have determined by this Court. Because of the duplication involved in Penn Water's questions I and II and the Pennsylvania Commission's questions II and III, all of which seek to present a single issue not yet properly before the Court, there are only three basic questions presented, none of which presents a proper basis for the granting of certiorari in this case.

Question I of the Pennsylvania Commission may be accepted as the first question. However, we will show in another part of this brief that it rests upon a conclusion of

fact contrary to that determined by the Commission upon substantial evidence, and then presents a question of law not faced by either the Commission or the Court below. It clearly does not present a basis for certiorari. (See Argument I herein).

Question III of petitioner, Penn Water, is the only one of the questions that was passed upon by the Court below, and may be accepted as the second question. However, it does not present a conflict of circuits such as is asserted by Penn Water. The Court below correctly followed the determination of the U. S. Court of Appeals for the Third Circuit in *Safe Harbor Water Power Corporation v. F. P. C.*, 179 F. 2d 179, 185 (1949) cert. den. 339 U. S. 957 (1950), *which is the only other opinion which has dealt squarely with this question.* In that case, certiorari was denied by this Court after it was faced with the same misleading argument as to conflict of circuits which is now presented here by petitioners. (See Argument II herein).

Penn Water's Questions I and II have their counterparts in Questions III and II, respectively, of the Pennsylvania Commission. These four questions, separately stated at length in the petitions, can be simply resolved into the one issue which is stated as the first sentence of Penn Water's "Statement" (its petition, pp. 2-3) namely, "the primary issue raised by this petition is whether the FPC * * * may compel electric utilities to perform, and may base its rate orders upon continued performance of, contracts which have been adjudged by the courts to violate Federal antitrust laws, public policy and the laws of the utilities' state of incorporation." This simplified statement, however, like the more complicated questions stated in the petitions, is calculated to mislead this Court to believe that such an issue had been raised in the proceeding before the Commis-

sion, had been ruled upon by the Commission after evidence and argument, and was then confirmed by the Court below.

Actually, the issue stated by petitioners here was never presented to the Commission, and was not accepted as an issue by the Court below. At best, it was suggested only by Penn Water's petition for rehearing before the Federal Power Commission, in response to which the Commission pointed out that if Penn Water desired to raise such questions (which it had ignored during the four years that the rate case was before the Commission and which involved a disruption of the integrated power system as Penn Water had presented it to the Commission), the provisions of the Commission's rules and the Federal Power Act relative to change or withdrawal of tariffs should be complied with (Record Vol. XVI, pp. 375-382).

In confirming the Commission's denial of Penn Water's petition for rehearing, the Court below makes the squarely procedural administrative law determination that Penn Water could not present to the Court of Appeals, *for the first time* as basis for setting aside or remanding the Commission's Orders, matters which the petitioners had ignored during the course of hearings before the Commission, which they had subsequently made the basis of a collateral attack in Court proceedings to which the Commission was not a party, and for which the Federal Power Act specifies a proper procedure of presentation in the first instance to the Commission. That was the basis of the decision below, which petitioners seek to avoid by misstating the issues to this Court, in Penn Water's Questions I and II and the Pennsylvania Commission's Questions III and II.

Phrased succinctly as a legal proposition for review by this Court, the proper third question is:

Was the Court of Appeals, as the tribunal established by law to review decisions of the Federal Power Commission, correct in affirming a decision of the Commission that the Federal Power Act requires a regulated licensee and utility to charge the rates and to perform the services required by order of the Commission, supported by an extended record and issued after protracted hearings, until that utility has sought and obtained a change of its rates and service under procedures duly established by the Commission under the Act?

The ensuing argument (Argument III) will demonstrate that the Court below correctly answered that question in orthodox fashion, under well-established doctrines of administrative law consistently confirmed by this Court.

If petitioners wish a determination of the issues which they erroneously claim to be the questions of this case, they should present the issues which raise those questions in *original* proceedings before the Commission, where a complete record may be made with reference thereto, and then bring them up through the proper appellate procedure. Only then will they be ripe for determination.

ARGUMENT

As shown above, there are really only three issues raised by the questions presented by petitioners. This Court does not decide upon certiorari any issues other than those specified in the petition. Rule 38, U. S. C. A. Title 28, Rules, U. S. Supreme Court, p. 66; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357 N. 2 (1940). This argument will address itself to three propositions relating separately to each of the three issues presented by the questions which petitioners raise:

I. *The Court of Appeals' affirmance of the Federal Power Commission's determination, that it has jurisdiction over all of the wholesale sales of Penn Water, was correct and creates no conflict of circuits (Pennsylvania Commission's petition, p. 19, Question 1).*

II. *The Court of Appeals' affirmance of the Federal Power Commission's determination, that it has jurisdiction over Penn Water as a public utility under Part II of the Federal Power Act, was correct and creates no conflict of circuits as to the issue involved (Penn Water's petition, pp. 17-18, Question III).*

III. *The Court of Appeals' denial of petitioners' motions to annul or remand was correct and creates no conflict between the circuits (Penn Water's petition, p. 17, Questions I and II; Pennsylvania Commission's petition, pp. 19-20, Questions II and III).*

Accordingly, certiorari should be denied.

I.

The Court of Appeals' affirmance of the Federal Power Commission's determination, that it has jurisdiction over all of the wholesale sales of Penn Water, was correct and creates no conflict of Circuits (Pennsylvania Commission's Petition p. 19, Question I).

Pennsylvania Commission's Question I (its petition, p. 19) states:

> "Where electric energy is produced in Pennsylvania and thereafter sometimes commingled with electric energy flowing from another state and sold to Pennsylvania customers and where the proportions of such respective energy are ascertainable, are such sales in interstate commerce within the scope and intendment of the Federal Power Act and subject to the jurisdiction of FPC?"

This question is predicated upon an assumption of fact (namely, the separability of intrastate wholesale sales of power and energy by Penn Water to its Pennsylvania customers) which is contrary: (1) to the Record as made before the Federal Power Commission, (2) to the findings of the Commission, and (3) to the confirmance by the Opinion below of those findings as being supported by substantial evidence. It is fully met and disposed of by that portion of the Opinion which reads in part as follows (Record Vol. XVIII, pp. 61-64):

> "* * * It is said that (1) Penn Water's sales to its Pennsylvania customers for resale are sales of electric energy produced and sold in Pennsylvania; (2) the back-feed energy generated by Baltimore Company to Penn Water and sold by it to its Pennsylvania customers loses its interstate character when it is received by Penn Water and commingled with the Pennsylvania produced energy. Even if these sales of back-feed are considered interstate, it is suggested that they constitute so negligible a portion of Penn Water's total sales to Pennsylvania customers that they cannot furnish the basis of federal regulation, or that federal regulation may extend only to an allocable portion of interstate sales.
>
> "* * *
>
> "We are convinced from an examination of the voluminous materials submitted to us that the Commission properly found Penn Water to be part of an 'integrated and coordinated interstate electric system.' * * *
>
> "* * * *Given such interconnected and integrated interstate wholesale operations, there can be no such thing as assigning a particular sale solely to operations within Pennsylvania. Each sale is in effect a pool sale drawn from the integrated interstate system and hence interstate in nature.*
>
> "The same conclusion was reached by the Third Circuit with regard to another of the participants in this

pool, Safe Harbor. The court pointed out that Safe Harbor is 'part of a large integrated interstate electric system' and that its electric output 'must be treated as an integrated whole'. In the second *Safe Harbor* case, the court again held that Safe Harbor's sales 'constitute in fact wholesale sales in interstate commerce' because they are 'delivered to an integrated interstate electric system.'

"*We find substantial evidence in the record to support the Commission's factual findings with regard to the interstate nature of Penn Water's sales.* It is the nature of the operations underlying the sales which furnishes the basis for Commission action rather than legalistic niceties of title and place of sale. Those operations bring petitioners' rates and services within the reach of Part II of the Federal Power Act. The Commission did not assume jurisdiction over any direct consumer sales. It 'was meticulous to take in only territory which this Court had held the States could not reach' — interstate sales at wholesale." (Emphasis added — footnotes omitted.)

The concluding paragraph of the Court's Opinion (Record p. 72) is also particularly applicable here, because Pennsylvania Commission's Question I involves "just the sort of weighing of evidence and making of pragmatic adjustments which fall within the special competence of an expert agency and which should not be interfered with by a court unfamiliar with day-to-day operations and complex technological and financial materials". The Court below pointed out the proper scope of review, when it continued (Record p. 72) "Our review is designed to leave to the Commission the flexibility which is necessary if it is satisfactorily to discharge its function of protecting the public interest, and yet to prevent arbitrary action outside the scope of the Commission's authority. *We have examined all the points raised and are convinced that the Commis-*

sion's treatment of each one was within the range of its statutory authority and was supported by substantial evidence." (Emphasis added.)

This ruling by the Court below is in direct pursuance of the review provisions of the Federal Power Act, Section 313 (U. S. C. A. Title 16, Sec. 825 l) and is in accord with a long line of decisions of this Court in many fields of administrative action.

Rochester Telephone Co. v. U. S., 307 U. S. 125, 146 (1939);
National Labor Relations Board v. Waterman S.S. Co., 309 U. S. 206, 208, 209 (1940);
National Labor Relations Board v. Link Belt Co., 311 U. S. 584, 596-597 (1941);
Colorado v. Interstate Gas Co., 324 U. S. 581, 586-590 (1945).

There is also nothing in the Record by way of evidence which would support the analogy which Question I of the Pennsylvania Commission seeks to draw between the complicated, integrated pool operation of the interconnected electrical system here involved, to the relatively simple local sales of gas involved in the cases of *Peoples Gas Co. v. Pub. Ser. Comm.*, 270 U. S. 550 (1926) and *Lone Star Gas Co. v. Texas*, 304 U. S. 236 (1938).

The Pennsylvania Commission did not present any evidence at any time to the Federal Power Commission. Its brief to the Federal Power Commission did not raise the issue now raised by its Question I, and did not cite either of the above cases. This observation is also true as to the briefs filed with the Commission by Penn Water. On the contrary, the Pennsylvania Commission relied for its jurisdiction over sales to the Pennsylvania customers of Penn Water, not on the argument that they constituted clearly separable sales of Pennsylvania generated energy, but on

the argument that they constituted "joint" sales by Penn Water and Safe Harbor and that the Federal Power Act (unlike the Interstate Commerce Act) did not give the Federal Power Commission jurisdiction over "joint" sales and services. This unsupported, untenable argument was effectively answered by the Commission in its Opinion 173 (Record pp. 56-58) and was abandoned by both the Pennsylvania Commission and Penn Water in the Court below.

The attempt to substitute before the Court below the argument now presented by Pennsylvania Commission's Question I was futile, because of the complete lack of support in the Record for any separability of the sales to the Pennsylvania customers of Penn Water from the overall operations of the power pool. The whole tenor of the evidence of experts for the Commission and for Penn Water was that it is impossible to identify kilowatt hours of electric energy fed into and sold out of an interconnecting transmission system of a power pool, such as is here involved. Aside from that, the energy use made of the pool by each particular customer is itself less valuable to any particular customer than the capacity (power) use made of the hydro-plants to replace steam generation. And so, unlike the case of *Peoples Gas Co. v. P.S.C., supra,* relied on by Pennsylvania Commission, the amounts of intrastate power and energy (capacity service as well as energy) are not separable for purposes of intrastate regulation. (See the Commission's Opinion 173, Record Vol. XVI, pp. 51-58).

Question I as raised by the Pennsylvania Commission asks this Court to substitute its judgment for that of the Court below and for that of the Federal Power Commission on *issues of fact* involving complicated technical questions, which the Commission was particularly qualified to determine and was authorized by statute to determine with finality. This Court must refuse this request.

Accordingly, the Pennsylvania Commission's request for certiorari rests only upon the two questions (II and III) which go to the denial by the Court below of the motions to annul or remand, discussed hereinafter, in Argument III.

II.

The Court of Appeals' affirmance of the Federal Power Commission's determination, that it has jurisdiction over Penn Water as a public utility under Part II of the Federal Power Act, was correct and creates no conflict of Circuits as to the issue involved (Penn Water's Petition, pp. 17-18, Question III).

Penn Water's Question III (its petition, pp. 17-18) states:

> "Does Part II of the Federal Power Act repeal by implication regulatory provisions of Part I of the Act; and is a corporation which is subject to regulation under Part I of the Federal Power Act as a licensee under contract with the Federal Government also subject to the different regulatory scheme of Part II of the Act, as the D.C. Circuit held contrary to statements of the Court of Appeals for the Second Circuit and another panel of the D.C. Circuit?"

It is difficult to believe that counsel seriously expected this question to provide grounds for the issuance of certiorari, upon the claimed conflict of circuits specified in Penn Water's petition (pp. 32-33). The Third Circuit, in the second Safe Harbor Rate case, 179 F. 2d 179, 185 (1949) cert. den. 339 U. S. 957 (1950), and the Court below are in clear agreement in the only two Opinions which have squarely faced the issue, considered it, discussed it, and made rulings thereon.

Penn Water suggests a conflict of circuits for three reasons, all of which are untenable: (1) a statement in the first Safe Harbor decision by the Third Circuit, *Safe Harbor*

Water Power Corp. v. FPC, 124 F. 2d 800, 808 (1941) cert. den. 316 U. S. 663 (1942), which did not have the issue before it, which at p. 804, footnote 4, states the Court's view as contrary to Penn Water's contention here, and which in any event would yield to the later decision by the same circuit in the second Safe Harbor case, *supra;* (2) an earlier decision by the United States Court of Appeals in the District of Columbia, *Niagara Falls Power Co. v. FPC*, 137 F. 2d 787, 792 (1943), which was not a rate case, which did not have the matter directly in issue, and which likewise must yield to the later pronouncement of the Court of Appeals below, speaking for the same circuit; and (3) a random statement in *Alabama Power Co. v. FPC*, 128 F. 2d 280, 293 (1943), which was not a rate case and again did not deal squarely with the issue.

The Opinion below (Record pp. 57-61), in conjunction with the above referred to Opinion of the Third Circuit in the second *Safe Harbor rate case* (179 F. 2d 179, 185), shows that the clear language of the Federal Power Act and the legislative history of the Act fully support the construction of Part II adopted by the Court below and that there is no error calling for review by this Court. In one brief paragraph the Opinion below disposes of the argument that there were other contrary rulings as follows (Record, p. 58):

> "The only judicial utterances cited to us in this regard are to the effect that 'Part II, as added in 1935, gives the Commission jurisdiction over the transmission and sale of electricity at wholesale in interstate commerce, whether or not by licensees' and that the Safe Harbor Company 'is not only a *licensee* under Part I but it is also a *public utility* under Part II.' Neither *Alabama Power Co. v. Federal Power Commission* nor *Niagara Falls Power Co. v. Federal Power Commission*, both of which contain language which

might be thought to run counter to Part II jurisdiction over a licensee, was a rate case. Neither involved Part II and the possibility of conflict between Parts I and II was not discussed."

The same arguments now presented in support of Penn Water's Question III were presented to this Court and rejected as forming no basis for certiorari in the above referred to second *Safe Harbor rate case*, 339 U. S. 957 (1950). This Question provides no adequate ground for the granting of certiorari, and Penn Water's petition must stand or fall upon its Questions I and II, as discussed hereinafter under Part III of this Argument.

III.

The Court of Appeals' denial of Petitioners' motions to annul or remand was correct and creates no conflict between the Circuits (Penn Water's petition, p. 17, Questions I and II; Pennsylvania Commission's petition, pp. 19-20, Questions II and III).

As earlier indicated (Restatement of Questions above), the several overlapping questions contained in Penn Water's petition as Questions I and II and the Pennsylvania Commission's petition as Questions II and III, are entirely summarized in Penn Water's claim that the "primary issue raised" is "whether the FPC (in the absence of any express authority in the Federal Power Act such as is found in certain other Federal regulatory statutes) may compel electric utilities to perform, and may base its rate orders upon continued performance of, contracts which have been adjudged by the courts to violate Federal anti-trust laws, public policy and the laws of the utilities' state of incorporation" (Penn Water petition, pp. 2-3). This question is simply not presented by the record, was not before the

Court below, and could not properly be ruled on by this Court in this proceeding.

The Federal Power Commission did not order the performance of any contracts as such, in any of the Orders affirmed below, or of any particular provisions of any contracts (most assuredly not the provisions of Article IV and V of the Penn Water contract, which were the sole provisions upon which the Fourth Circuit rested its Opinion regarding the invalidity of that contract).* When in its petition for rehearing before the Federal Power Commission, Penn Water for the first time suggested to the Federal Power Commission that the basic power contracts had been placed in litigation in the Courts, the Commission, in denying the petition (Opinion 173A, Record Vol. XVI, pp. 372, 375), informed Penn Water that the Commission's Order did not rest upon the decision of "questions as to the legality of the foundation contracts which are in litigation", but rather was founded upon the *operations* of the combined Penn Water-Safe Harbor-Consolidated system and the *services* as actually rendered by Penn Water.

The Federal Power Commission pointed out that until such operations and services were changed with the approval of the Commission, under the rules and regulations of the Commission issued in pursuance of the provisions of the Federal Power Act, Penn Water was bound to render them at the reduced rates prescribed by the Commission in its Order of January 5, 1949. The Commission thus met Penn Water's eleventh hour maneuver — a collateral attack

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* The Fourth Circuit's holding that the Penn Water contract was invalid only because of the provisions of Articles IV and V appears in at least three places in its first opinion (Record, Vol. XVIII, pp. 7, 8, 25) in its second opinion (Record, Vol. XVIII, p. 37), and also in its opinion in the Safe Harbor Contract Case (p. 3 of printed pamphlet copy supplied by Penn Water).

to avoid the long overdue rate reduction — by referring Penn Water to the orderly processes of the law as prescribed by the Federal Power Act, implemented by the Commission's rules. If there was no error in the Commission's denial of petition for rehearing (and we submit clearly there was none for reasons hereafter briefly summarized), there was likewise none in the lower Court's affirmance thereof.

The provisions of the Penn Water contract held to be invalid *per se* (Articles IV and V only) have played no part in the rate orders of the Commission. The services originally began under the contracts in 1931, and have continued in exactly the same manner from 1931 to the present date. Obviously there must be rates to pay for such services (regardless of contract), and under the law they can properly be only the just and reasonable rates allowed by the Federal Power Act and prescribed by the Commission in this case.

Petitioners insist that the Orders of the Commission, prescribing reasonable rates based on operations, must be destroyed because of the illegality of the contracts, and moreover, (by inference here and statement to the Court below) still claim the right to keep the exorbitant rates prescribed by the very contracts which they claim to be illegal. In all equity and justice, there was never a clearer case for upholding the orderly processes of the law to defeat such unconscionable conduct.

What petitioners overlook is that when Penn Water filed its contract as a tariff in 1936 under the Federal Power Act, its former obligations to serve under the contracts and at the rates therein prescribed passed out of the realm of contract and into the area of duty prescribed by law. The *tariffs* (not the contracts), from that date and until with-

drawn or changed in the manner prescribed by the Federal Power Act (Sec. 205 as described by the Commission in its Opinion No. 173A, Record Vol. XVI p. 372), constituted the only lawful terms of service for Penn Water.* Any departure by the parties thereto would itself be unlawful.

Texas & Pacific Ry. v. Mugg, 202 U. S. 242 (1906);
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 439-449 (1907);
Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S. 566, 573 (1921);
Davis v. Henderson, 266 U. S. 92, 93 (1924);
Davis v. Cromwell, 264 U. S. 560 (1924);
Northwestern Pub. Serv. Co. v. Montana-Dakota Co., 181 F. 2d 19, 22-23 (1950); affirmed *Montana-Dakota Co. v. Northwestern Pub. Serv. Co.*, 341 U. S. 246, 95 L. Ed. 912 (May 7, 1951).

The Eighth Circuit's opinion in the *Montana-Dakota* case states, in part:

> "The plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act * * *, and decisions under the latter act should be controlling here * * * The rates filed and approved by the Commission are the lawful rates until changed in the way approved by the Act * * *
>
> "Moreover, the transmission of electric energy being at wholesale and interstate, the seller must collect the charge named in the filed rate and the purchaser

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* It has long been established administrative and utility law that, however great a regulated utility's substantive right may be, it must comply with the procedures established by the law for perfecting it.

State ex rel v. Kansas Postal Tel. Co., 96 Kan. 298 (1915), holding that a utility with a constitutional right to discontinue service, because it was operating at a loss, must nevertheless comply with the procedure of securing Commission approval to withdrawal.

State ex rel RR. Commissioners v. Bullock, 78 Fla. 321 (1919), affirmed 254 U. S. 513 (1921).

> must pay that rate. So long as the filed rate is not changed in the manner provided by the Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike."

This Court, in affirming on other grounds, recognized the doctrine of the filed tariff, saying in part that the utility "* * * can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a Court can authorize commerce in the commodity on other terms."

The Court of Appeals for the Fourth Circuit, in deciding the Penn Water contract case, must have had this law well in mind when it rested its decision partly upon the case of *Georgia v. Pennsylvania RR. Co.*, 324 U. S. 439, 452-460 (1945). That case held that utilities as regulated industries are not *per se* exempt from the Sherman Act, but also stated clearly that in condemning a Sherman Act violation, the Court could not and would not intrude on the primary jurisdiction of the Interstate Commerce Commission over its filed tariffs.

Referring to *Keogh v. Chicago & N. W. R. Co.*, 260 U. S. 156, 161-162 (1922), the Opinion in the *Georgia* case (p. 453) states:

> "* * * The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added: 'This stringent rule prevails, because otherwise the paramount purpose of Congress — prevention of unjust discrimination — might be defeated. * * *' "

Referring to *North Dakota ex rel. Lemke v. Chicago & N. W. R. Co.*, 257 U. S. 485 (1922) and *Texas v. I. C. C.*, 258 U. S. 158 (1922), the *Georgia* case (p. 454) further states:

> "It is clear that a suit could not be maintained here to review, annul, or set aside an order of the Interstate Commerce Commission. Congress has prescribed the method for obtaining that relief. It is exclusive of all other remedies, including a suit by a State in this Court. * * *"

And, after referring to and quoting *Central Transfer Co. v. Terminal R. Asso.*, 288 U. S. 469 (1933), which likewise involved application of the "primary jurisdiction" doctrine as explicitly embodied in the Clayton Act, the *Georgia* case (p. 455) in referring back to all of these cases said:

> "* * * *We adhere to these decisions.* But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia.
>
> "The relief which Georgia seeks is *not a matter subject to the jurisdiction of the Commission. Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled.* * * *" (Emphasis added).

The Court of Appeals in the Fourth Circuit case was apparently mindful of these clearly established limitations upon its powers. This is evidenced by the extent to which its Opinion observes that it does not purport to affect the orders of the Federal Power Commission here under attack. Thus, it took care to point out that its decision did not have the very effect which is now ascribed to it as the principal basis for the present petitions. After discussing the Federal Power Commission rate case Opinion affirmed below, the Fourth Circuit said (184 F. 2d 552, 566) that it did not "undertake to gainsay the view of the Commission that *even if the restrictive conditions of the basic contract*

are invalid, a. to which the Commission expressed no opinion, it still has the duty and authority under the Federal Power Act to encourage and establish the interconnection of electrical facilities * * *".

The Fourth Circuit, at the conclusion of its Opinion in the recently decided Safe Harbor contract case (Opinion of Jan. 3, 1952, pamphlet copy filed with this Court, pp. 22, 23), summarized its position as follows:

> "*There need be no interference with the rate making power or the overall control of the Federal Power Commission.* We repeat with respect to Safe Harbor what was said in regard to Penn Water in our prior opinions, 184 F. 2d 552, 568, and 186 F. 2d 934, 937:
>
> " '*It is not our function in this case to decide how far the activities of Penn Water and Consolidated under the basic contract are subject to the regulations of the Federal Power Commission* or the Pennsylvania Public Utility Commission, either or both. * * * It may well be, although the present arrangement between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electrical energy between them may be continued by some method that would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania' (184 F. 2d 568).
>
> " 'Throughout the trial of this case and in the argument of the pending motion, Penn Water has reiterated its desire to continue to supply electric energy to Consolidated; and in view of the close relationship between the parties, the existence of interconnecting equipment *and the control over its rates by the regulatory bodies, there is no reason to fear that the interest of consumers of electricity in Maryland will suffer through the invalidation of the existing contract between the two* utilities' (186 F. 2d 937)" (Emphasis added).

Assuming, as the Fourth Circuit says, that "there need be no interference with the rate making power or the overall control of the Federal Power Commission", what is there to be placed before this Court?

The Federal Power Commission, having found the operations of Penn Water as conducted from 1931 to date to be in the public interest, but at unjust and unreasonable rates, has prescribed just and reasonable rates and the conditions of service to which they apply (the latter being the conditions of service as previously rendered). The schedules prescribed by the Commission replace the pre-existing "filed tariffs" and the contracts between the parties, as far as service and rates are concerned. The decision of the Fourth Circuit case, in condemning certain contract provisions, can have no direct effect upon the filed tariffs or service as rendered thereunder prior to the effective date of the Commission's Orders, nor can it have any direct effect upon the schedules required by the Commission's Orders now attacked, which continue operations and services found to be in the public interest and establish reasonable rates therefor. The Court below determined, on the Record as made before the Commission, those matters left for the Court by the review provisions of the Federal Power Act (Sec. 313), concerning the power of the Commission to determine just and reasonable rates and terms of service.

The decisions of the Fourth Circuit in both contract cases affect in no way the justness or reasonableness of the Federal Power Commission's Orders in relation to the facts of operation, particularly since Penn Water does not deny that services have continued during the period subsequent to February 1, 1949, in the same manner as they have always been rendered since 1931. If the decisions in the Fourth Circuit cases can have any effect upon the reason-

ableness of the Commission's Orders for the future, regarding any desire of Penn Water to offer services in different form (or at different rates), this issue remains to be raised and established by Penn Water in the orderly manner prescribed by Section 205 of the Federal Power Act, and upon a properly made new record with reference thereto.

The petitions for certiorari constitute a studied and carefully presented attempt, first, to divert this Court's attention from the purely procedural administrative law determination made by the Court of Appeals for the District of Columbia Circuit, in denying petitioners' motions to annul; and second, to attract the Court's attention to an asserted conflict between the views of the Fourth Circuit and the Court below, as to the interrelationship of the Sherman Act and the Federal Power Act, which had not been presented to the Commission and hence could not have been covered by its Orders. They almost ignore the nature of the findings of the Court below that the Federal Power Commission, after 26,000 pages of record, had issued opinions and orders clearly within its jurisdiction under the Federal Power Act and amply supported by evidence in that Record, and that any rights which petitioners may have to change the operations and rates of Penn Water, predicated upon a subsequent decision by a Court in other proceedings regarding the contractual relation of the parties, may and must be properly presented to the Federal Power Commission under the appropriate sections of the Federal Power Act.

The Court below, faced with petitioners' motions to annul or remand, painstakingly considered whether the Fourth Circuit's decision regarding the applicability of the Sherman Act, the Pennsylvania Public Utility laws, and public policy to the long-term power contract between Penn Water and Consolidated, would apply equally to rate orders of the Commission. This matter had been pressed

upon the Court by petitioners in the motions to annul or remand, and had constituted the first part of the oral argument below. Petitioners claimed below, as they claim here, that the Fourth Circuit had collaterally destroyed the Orders of the Federal Power Commission.

In answering the argument of petitioners, the Court below expressed its opinion that integrated electric power service arrangements which might be illegal as entered into by agreement of the parties (whether because of the Sherman Act or some other law) might, nevertheless, be lawful if compelled by Congress acting through a duly established regulatory agency (Record Vol. XVIII, pp. 49-53). The Court below reconciled its position with that of the Fourth Circuit. It did not disagree therewith.

Furthermore, the Court below did not make a definitive decision as to any matter which it deemed to be within the Commission's primary jurisdiction. It clearly pointed out to petitioners that if a definitive decision as to such matter is to be had, it must occur only after petitioners (or others) have properly presented the matter to the Federal Power Commission, in the first instance, under the appropriate sections of the Federal Power Act. The Court below said (Record Vol. XVIII, pp. 54-55):

> "In our view, the Fourth Circuit's opinion neither purported to nor did relieve Penn Water from its obligation under the Federal Power Act to continue the then-existing services and rates. *It is those services and rates, reflecting underlying operations, which were the subject of the Commission's order.* 'A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by' the regulatory statute. *The validity of Commission action in this proceeding must be determined in light of the criteria furnished by the Federal Power Act, as applied*

to the operations and arrangements under scrutiny. If jurisdiction was properly assumed by the Commission, if its rate order is 'just and reasonable' within the meaning of the Federal Power Act, and if its findings are supported by substantial evidence, Penn Water can have no complaint and our review is at an end. If petitioners, as a result of the Fourth Circuit's decision, wish to make any changes in operations, contracts, arrangements, etc., within the jurisdiction of the Federal Power Commission, they must do so in accordance with the Federal Power Act. Under §205(d) thereof, 'Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public.' Pursuant to that section, petitioners may submit new arrangements and rates based thereon to the Commission. And the Commission 'either upon complaint or upon its own initiative without complaint' may 'enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service * * *.' *If Penn Water feels itself aggrieved after such proposed changes have been acted upon by the Commission, it may at that time bring a new petition for review.* In short, a 'rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided' by the statute." (Emphasis added.)

This portion of the Opinion shows the real procedural nature of the Court's decision below. It would necessarily be the basis for affirmance here if certiorari were to be granted. The Fourth Circuit has stated no conflict therewith. There could be no such conflict, because it is protected by many decisions of this Court.

The benefits to the public which will result from the final (but much delayed) affirmance of the Federal Power Com-

mission's Orders by the Court of Appeals for the District of Columbia Circuit should not be further delayed by reargument of well established law in this Court. Again, the opinion below succinctly summarizes the legal and practical reasons why the motions to annul or remand were denied, which reasons apply equally to a denial of the applications for certiorari here (Record Vol. XVIII, pp. 55-56):

> "To grant petitioners' motions and set aside the order at this time would be to substitute antitrust criteria for those of the Federal Power Act, a substitution which would be at cross-purposes with the intent of Congress. It would result in the reopening of a rate proceeding begun in 1944 because of an issue raised for the first time on rehearing in 1949 and a decision handed down in a suit between private parties under a non-controlling statute in 1951. In view of this chronology, we think the Supreme Court's statement in *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 514 (1944), is especially pertinent: 'If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.' *The effect of granting petitioners' motions would be to disrupt a pattern of regulation which was carefully drawn to meet the problems of a complex industry.*" (Emphasis added.)

It is clearly manifest that the petitions filed here, in order to delay or defeat a substantial rate reduction, attempt to place the Fourth Circuit and the Court below in conflict upon substantial issues of law by having each Court decide *more than was really before it*, and by placing interpretations upon each Court's opinion inconsistent with

its language. Such an effort cannot support certiorari in this case.

Penn Water is not harmed by being properly relegated to its remedies of petition to the Federal Power Commission to change its services and rates, provided it can show justification for such changes. In the meantime, all parties will serve and be served under tariffs which were found by the Commission to be in the public interest as to the integrated, coordinated power system created hereby. The rates have been prescribed by the Commission as just and reasonable, upon a record which contains no reversible error. Any result, other than prompt denial of certiorari, would lead only to the chaos and confusion which the Federal Power Act sought to avoid by providing for the filing of new tariffs with the Commission.

On the other hand, the granting of certiorari in this case would reopen the validity of Federal Power Commission rate orders which are the result of three years of protracted hearings, years of research and study by that Commission's staff of experts, and careful prior judicial scrutiny of over 26,000 pages of expert testimony and hundreds of highly complicated exhibits. All factors were carefully weighed and considered by the Federal Power Commission before the orders, reducing Penn Water's wholesale charges to Consolidated, were issued. They were again carefully considered by the U. S. Court of Appeals for the District of Columbia, after three days of extensive argument by counsel. The Orders were found to be completely valid in every respect, and not in conflict with the Fourth Circuit's decision in the *Penn Water* contract case.

Every conceivable issue which could be properly brought before this Court, therefore, has already been painstakingly considered and adjudged, first, by the competent trained

technical experts of the Commission, and then by the Court below. There is no need for this Court to assume the tremendous responsibility of reviewing this already reviewed, immensely complicated case. Such a review is not only legally unnecessary. It would further prolong the long overdue rate reducation due from Penn Water to Consolidated, and through the latter company, to the Maryland public which has been forced to pay, and is still paying, excessive rates for electricity.

CONCLUSION

Wherefore, the petitions for certiorari should be denied.

Respectfully submitted,

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